

GUIDE TO ADDRESSING EMPLOYEE PERFORMANCE PROBLEMS

Introduction

The Civil Service Reform Act, at 5 USC Chapter 43,¹ provides the legal framework for monitoring and evaluating employee performance, and for taking corrective action if an employee's performance is unacceptable.²

If an employee's performance is unacceptable, the Department may remove or reduce in grade the employee, following appropriate procedures.³

This short Guide is not intended to be all-inclusive. Applicable laws, rules and regulations may change, and case law further defines the requirements.

General Performance Appraisal System

The Department's OPM-approved General Performance Appraisal System (GPAS) forms the basis for taking action against an employee for unacceptable performance. The GPAS provides the means for a supervisor to monitor and evaluate an employee's work.

The basis of the GPAS system is the performance agreement. At the beginning of the rating period,⁴ or soon after an employee enters on board, a supervisor must establish a performance agreement in consultation with the employee.

A performance agreement is a written document that includes critical and non-critical performance elements (a description of the employee's duties) and performance standards for each element (how well, how quickly, and how much the employee is expected to do).

Under the Department's GPAS system, an employee's supervisor, designated customers and co-workers, and the employee him/herself have an opportunity to provide comments on the employee's performance and rate him/her numerically from 1-10 (10 being the highest). The purpose of the feedback and rating is for developmental purposes only. The employee's supervisor

¹ OPM has established government-wide standards implementing the provisions of Chapter 43. These are found at 5 CFR Part 430. The Department also has issued related Personnel Manual Instructions (PMIs). These are PMI 430-2, General Performance Appraisal System; and PMI 432-1, Reduction in Grade or Removal Based on Unacceptable Performance.

² While unacceptable performance is generally best dealt with under Chapter 43, in certain circumstances, it may be advisable to take action under 5 USC Chapter 75, the provision relating to employee misconduct.

³ The procedures described in this document do not apply to employees still in a probationary or trial period. A supervisor should contact the Employee Relations Team for information on removal of probationary or trial period employees.

⁴ The Department has three rating cycles: May 1-April 30 for non-rating officials; June 1-May 31 for rating officials; and July 1-June 30 for SES employees.

ultimately retains the discretion to establish the Rating of Record, which constitutes either a Pass or a Fail rating. An approving official reviews the Rating of Record.

An employee's performance is unacceptable when he/she fails to meet the performance standards of at least one critical element of his/her performance agreement.

During the rating period, a supervisor is expected to monitor the employee's work in light of the elements and standards, and to hold at least one oral progress review in the middle of the appraisal period.⁵

At the end of the rating period, the supervisor gives the employee his/her annual Rating of Record and discusses performance.

If the employee's performance falls to the "Fail" level at any time during, or at the end of, the rating period, the supervisor should notify the employee that his/her performance has fallen to the "Fail" level and commence further action as discussed below.

Notice of Opportunity to Improve Period

At this point, the supervisor may take informal steps to improve the employee's performance deficiencies and/or prepare a written Notice of Opportunity to Improve. This notice must include the specific critical elements rated Fail; specific examples of the employee's Fail performance; the length of the opportunity to improve period; guidance on how to improve performance; specifics on what constitutes Pass performance; and consequences of failure to improve.⁶

During the opportunity period, the supervisor should provide assistance to the employee, document feedback and assistance provided, and document results (i.e., examples of employee's performance).

If there is any reason to suspect a physical, mental, or emotional basis for the performance problem, the supervisor must give the employee the opportunity to raise a medical basis for the problem, refer the employee to the Employee

⁵ If an employee is a bargaining unit employee, the supervisor should also consult the Collective Bargaining Agreement (CBA) because in certain situations, bargaining unit employees have additional rights. For example, if a bargaining unit employee's work has fallen below the acceptable level, he/she is entitled to quarterly progress reviews.

⁶ There is no set time period for an opportunity period. The Department's policy is that a minimum of 30 calendar days will be given. However, for most positions, a longer opportunity period would likely be more appropriate.

Assistance Program (EAP),⁷ rule on requests for reasonable accommodation, if any, and document all of the above.

If, as the result of the opportunity period, the employee's performance rises to the Pass level, the employee should be so notified. An employee must sustain performance at the Pass level for one year from the beginning of the opportunity period. Otherwise, action to remove or reduce in grade may be commenced.

Removal or Reduction In Grade

If the employee's performance remains at the Fail level at the end of the opportunity period, the supervisor may issue a notice of proposal to remove or to reduce in grade.

Written documentation of the employee's unacceptable performance and the supervisor's assistance to the employee is crucial to support an action based on unacceptable performance.

A Notice of Proposal to Remove or Demote must provide the employee 30 calendar days' written notice before an action is actually taken; specify instances of Fail performance occurring in the past year and critical elements involved; and grant the employee an opportunity to respond orally and/or in writing to the deciding official, who must be at least one level higher than the proposing official.

The deciding official must review the notice of proposal to remove or reduce in grade and supporting documentation, and consider the employee's response(s), if any, before issuing a written decision as soon as possible, but no later than 30 days, after the date of expiration of the notice period.⁸

The written decision should include reasons for the action, including instances of unacceptable performance; the supervisor's attempts to assist the employee; a discussion of the employee's response, if any; the effective date of the action; and appeal rights.

Appeal Rights

An employee has a choice of appeal venues, depending on his/her status. However, an employee may select only one venue.

⁷ The EAP is a free and voluntary professional counseling and referral service designed to help employees with problems on and off the job. Before referring an employee to EAP, a supervisor should consult with the Employee Relations Team (ERT) regarding procedures. The EAP's 24-hour phone numbers are: 1-800-222-0364 and 1-888-262-7848 (TTY).

⁸ The notice period may be extended an additional 30 days under regulations prescribed by the head of the agency. Any longer extensions can be made only in accordance with OPM regulations.

All employees have the right to avail themselves of the Equal Employment Opportunity (EEO) process, where it is alleged that a decision to remove or reduce in grade was based on illegal discrimination.⁹ However, the EEO process is limited to determining whether an employee has been discriminated against, and does not *per se* review the appropriateness of the procedures or substance of the removal.

Bargaining unit employees have the right to avail themselves of the negotiated grievance procedure under the Collective Bargaining Agreement (CBA). The union may take the grievance to arbitration. Arbitration is a type of quasi-adjudication in which the Department and the employee, represented by the Union, argue their respective cases before an impartial arbitrator, who issues a binding decision. Arbitration procedures are set forth in Article 43 of the CBA.

Competitive service or preference eligible employees in the excepted service, and certain nonpreference eligible employees in the excepted service, may appeal performance-based actions to the Merit Systems Protection Board (MSPB).¹⁰

If an employee elects to appeal to the MSPB, the Department must prove, by substantial evidence, that it complied with the procedural requirements of 5 USC Chapter 43 and that the employee failed to meet the standards of at least one critical performance element. The MSPB will not review or mitigate the deciding official's choice of penalty. The employee may assert affirmative defenses, including allegations of discrimination, in an MSPB appeal.

⁹ The Department has established an Informal Dispute Resolution (IDR) Center as the first step for employee workplace disputes, disagreements, or complaints. The EEO process begins here as well. To initiate the EEO process, an employee must contact the IDR Center within 45 calendar days of the allegedly discriminatory agency action. The IDR Center is located at 490 L'Enfant Plaza, S.W., Suite 2100A, Washington, D.C. 20024; phone: (202) 619-9700; TTY: (202) 619-9731. If informal counseling does not resolve the matter, the employee receives a Notice of Right to File a formal EEO complaint. Complaints are filed with the Equal Employment Opportunity Group (EEOG) within 15 calendar days of receipt of a Notice of Right to File. EEOG is located at 400 Maryland Avenue, S.W., Room 2W240, Washington, D.C. 20202; phone: (202) 401-3560. If an employee files an EEO complaint, investigators under contract with the Department investigate the complaint and prepare a Report of Investigation. After receipt of the Report, an employee has the right to request a hearing before an Equal Employment Opportunity Commission (EEOC) Administrative Judge, or a Final Agency Decision from the Department. If the employee requests a hearing, the EEOC Administrative Judge issues a decision on the matter after the hearing.

¹⁰ To determine whether an employee is entitled to appeal rights to the MSPB, a supervisor should consult with the Employee Relations Team to determine the employee's status.

General Information

In taking actions under Chapter 43, supervisors should adhere to the merit system principles enumerated in 5 USC 2301(b).¹¹ Supervisors should also be aware of and avoid committing any prohibited personnel practices, as outlined in 5 USC 2302(b).¹²

Supervisors are encouraged to consult with the Employee Relations Team, Human Resources Group, for technical assistance with performance problems; and with the Division of Business and Administrative Law, Office of the General Counsel, for legal advice.

¹¹ The merit system principles state, *inter alia*, that federal employees should be selected through fair and open competition based on ability, knowledge, and skills; receive fair and equitable treatment without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition; receive equal pay for equal work; be retained on the basis of the adequacy of their performance and separated if they cannot or will not improve their performance to meet required standards; be protected against arbitrary action, personal favoritism, coercion for partisan political purposes, and reprisal.

¹² Prohibited personnel practices include, but are not limited to; discriminating for or against any employee or applicant based on race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation; coercing the political activity of any person or taking any action as reprisal for the person's refusal to engage in such political activity; discouraging or obstructing a person from competition for employment; granting a preference or advantage not authorized by law; taking or failing to take action against an employee because the employee has engaged in whistleblowing activity.